IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 2264 of 1995

with

CIVIL REVISION APPLICATION No 2265 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S. CM THAKKAR

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

1. Civil Revision Application No. 2264 of 1995
   MR GT DAYANI for Petitioner No. 1
   MR TUSHAR MEHTA for Respondent No. 1
   MR AD OZA for Respondent No. 1
2. Civil Revision Application No. 2265 of 1995
   MR GT DAYANI for Petitioner No. 1
   MR TUSHAR MEHTA for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 13/02/2003

COMMON ORAL JUDGEMENT

Both these revision applications are preferred against an order passed by the Gujarat Public Works Contract Disputes Arbitration Tribunal at Ahmedabad on 22.9.1995 in transferred Arbitration References No. 1/1994 and 2/1994.

Since above two arbitration references were pertaining to same work, originally both the references were referred to the Sole Arbitrator but thereafter in pursuance to sec. 21 of Gujarat Public Works Contract Disputes Arbitration Act, 1992, both the references were transferred to the said Tribunal. The Gujarat Electricity Board-respondent herein in both the petitions claimed Rs. 30,77,355.99ps. and that is in Arbitration Reference No. 1 of 1994. The work involved in both the references were known as "construction of raw water reservoir and pump house for units nos. 1 and 2 for Kutch Lignite power project at Panandhora-Kutch". As per the admitted facts, the work order was issued on 21.10.1983. The work was to be completed on 9.4.1985. The estimated costs of the said work was set at Rs. 32,11,015/- including the value of some materials to be supplied by the respondent-Board. The Gujarat Electricity Board-respondents based their claim on the grievance that the contractor petitioner herein abandoned the work on or about 5.10.1986 and invoking clause-4 of the agreement, possession of the site was taken over and remaining execution of work was awarded to other contract M/s. V.K. Patel & Co., which caused lost to the GE Board to the extent of Rs. 30,77,355.99ps, which is as under:

1. Rs.4,47,029.70ps. Which was paid to the contractor in excess of the work which he had done and also an amount of Rs. 2,07,868.88ps by way of interest at the rate of 18% p.a. from 5.10.86 to 4.5.89 i.e. up to the date of filing the reference.

2. Rs. 19,600.40ps. Being the value of unreturned material with

18% interest from 5.10.86 to 4.5.89

3. Rs.9,25,167.73ps. Being the additional cost incurred by the Board by entrusting the remaining work to another contractor, along with Rs. 4,30,202.98 being interest at the rate of 18% p.a. from 4.5.86 to the date of reference petition.

4. Rs.4,34,797.20ps. Being by way of administrative cost at the rate of 19% of the value of unexecuted work along with an amount of Rs. 2,02,180.71 ps. being the running interest at 18% p.a. on the aforesaid amount of special damages.

5. Rs.4,01,394.25ps. On account of general damages at the rate of 25% on the total amount of the aforesaid four claims on account of delay caused to subsequent other allied work to be carried out for completion of the project as a whole.

While contractor-petitioner herein also filed claims on nine heads before the Sole Arbitrator as well as before the Tribunal. The total claim which the contractor filed on different heads are as under:

1. Rs. 1,91,311.28ps. On account of the work done by him after the 5th R.A. Bill, which had not been recorded in the measurement Book.

2. Rs. 12,691.73ps. On account of loss of interest on the 5th RA Bill which was withheld for about one year.

3. Rs. 1,60,600.00ps. On account of security deposit in the form of bank guarantee which were wrongly encashed by the department without requisite notice.

4. Rs. 2,39,472.00ps. On account of 25% escalation on the work done after the original time limit.

5. Rs. 3,48,246.00ps. On account of extra rates in respect of excess in various items.

6. Rs. 7,66,853.00ps. On account of idle establishment, idle machineries and materials for a period of 43 months.

7. Rs. 2,39,200.00ps. On account of loss of profit at 20% on the remaining work of Rs. 11,96,265/- after the date of termination.

8. Interest at the rate of 24% per annum on the above claims.

9. Rs. 50,000.00 towards costs of arbitration.

Ld. Tribunal after hearing the parties, came to the conclusion that though the breach was on the part of contractor in abandoning the work on or before 5.10.1986, the GE Board as well as guilty to the extent of not supplying the drawings of the execution of the work at proper time and failed to take necessary steps to restore the electricity to the contractor causing delay in execution of work and, therefore, the case of the GE Board for forfeiting the security deposit of Rs. 1,60,600/ was not believed by the Tribunal. The Tribunal came to the conclusion that till 5.10.1986 when the contractor - present petitioner abandoned the work, the GE Board had already paid to him Rs. 18,24,428. On abandonment of work, the GE Board was constrained to employ second contractor M/s. VK Patel & Co. and had to pay Rs. 28,19,648/ and total amount which GE Board-respondent spent on the execution of the work comes to Rs. 46,44,076/. The Tribunal further observed that this amount was incurred by GE Board as against the original tender amount of Rs. 32,11,015/, after deducting the amount of tender value from the amount, GE

Board actually paid for the execution of the work, the remaining amount of Rs. 14,33,059/ were awarded to be paid by the contractor to the GE Board. As against that, the Tribunal also allowed the claim of the contractor for security deposit to the extent of Rs. 1,60,600/ and Rs. 6,160/ being the amount of interest on delayed payment of the 5th RA Bill. In addition to this, the Tribunal also awarded to the contractor from GE Board an amount of Rs. 1,00,000/ being the charges towards idle over-heads and establishment as claimed by the contractor as estimated by the Tribunal in its judgment.

The petitioner has filed these revision application against the above decision of the Tribunal in original Arbitration Reference No. 1 of 1994 as well as Arbitration Reference No. 2 of 1994.

Ld. advocate Mr. GT Dayani on behalf of the petitioner in both the petitions contended that the Tribunal has committed not only material irregularity but illegality as well. It was contended that rojkam denotes that the arguments of both the sides were over on 8.9.1995 and the matter was kept for judgment and before the judgment was pronounced, the respondent addressed a letter to the Chairman of the Tribunal along with the enclosure denoting actual payment made by the GE Board to the second contractor. It was contended that the letter as well as enclosure were not shown to the petitioner and were accepted. The consideration of the Tribunal of the issue involved resulted in illegality and material irregularity. It was further submitted that therefore, the order impugned is required to be set aside and the claims be remanded to the Tribunal for the fresh adjudication. It was further contended that there was no evidence produced by the respondent-GE Board in support of their claim and no party tendered oral evidence. In this respect, according to the ld. advocate for the petitioner, the illegality is committed as above, the GE Board did not adduce any evidence and in absence of evidence, the Tribunal proceeded to assess the claim and awarded the amount to the respondent-GE Board following their own methods which is evident from para-18 of the award impugned. According to the ld. advocate for the petitioner when actual damages cannot be ascertained in absence of evidence, it was not legal for the Tribunal to adopt a method to assess the damages basing market value. Ld. advocate for the petitioner has sought reliance on the decision of the Apex Court in the matter of Maula Bux vs. Union of India, reported in AIR 1970 SC 1955. Para-8 of the cited decision was relied and it was argued that in a case of breach, compensation can be calculated

in accordance with established rules only. In this case, it was possible for the Tribunal to assess the actual damages, but GE Board failed to adduce any evidence of damages. It was further contended that referring to the contract between the parties, reserving security deposit itself suggests that in any case of breach, the damages would be to the extent of security deposit only and not higher then that. It was contended that thereto illegality has been committed by the Tribunal and this Court is empowered to interfere with the award impugned in view of sec. 12(c) of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992. It was contended that since the award is vitiated as aforesaid, after setting aside, the matter be remanded for fresh adjudication to the Tribunal.

On the other hand, ld. advocate Mr. DR Dave submits that the GE Board in both the revision applications contended that in whole of the award, the Tribunal did not refer to ex. 20 and hence the question of award being illegal on that account would not arise at all. It was argued that the GE Board submitted on record documents from Ex.T-1 to T-18 and those documents are admitted by the contractor. Not only that, the documents which were produced by the contractor also admitted by the GE Board and, therefore, there was no occasion to adduce oral evidence. It was contended that neither material irregularity nor illegality is committed by the Tribunal in coming to the conclusion. Ld. advocate for the respondent fully supported the order impugned.

Having regard to the contentions raised by both the sides and scrutinising the record available with this Court, it transpires that certain conclusions of the issues arrived at on fact, no interference is required by this Court and no such contentions are advanced. The Tribunal came to the conclusion that GE Board-respondent herein could not provide drawings in time causing delay. The Tribunal also come to the conclusion after taking into consideration the facts on record that GE Board could not restore the electricity to the contractor causing some delay in execution of work and, therefore, Tribunal was of the opinion that the GE Board was not entitled to pocket security deposit of the contractor. At the same time from the evidence available on record, the Tribunal also come to the conclusion that after receiving the amount of 5th RA Bill and also of Rs. 1,00,000/ towards common amenities and even after requesting frequently the contractor did not resume execution of work after 5.10.1986, revealing intention of the contractor not to execute the work any further. On

evidence on record, the Tribunal also come to the conclusion that there was no other alternative for the GE Board-respondent herein to retrieve the possession of the site and awarding the remaining execution of the work to some other contractor. This conclusion of the Tribunal is based on appreciation of evidence and by no stretch of reasoning can be interfered with in revisional jurisdiction under sec. 12 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992.

So far as the assessment and awarding the damages to the respondent is concerned, the Tribunal adopted just and proper method. Only because the Tribunal has observed that they should proceed to evaluate the compensation in their own way would not mean that the method which was adopted by the Tribunal was totally not according to law and commercial tradition. Going through the para-19 of the judgment of the Tribunal, it is clear that the Tribunal has adopted legal method as envisaged under sec. 74 of the Indian Contract Act for assessment of the damages. The Supreme Curt decision cited by ld. advocate for the petitioner would not be helpful to the petitioner because the Tribunal assessed the damages on actual damages basis and not on hypothetical market value basis. It is pertinent to note here that vide exh. T-14 a contract executed between the GE Board and 2nd contractor M/s. VK Patel & Co. is on record and admitted by the petitioner, the Tribunal took this into consideration along with the amount which had already been paid to the contractor. After deducting the original tender amount from the amount already paid to both the contractors, the remaining amount certainly would be the damages as envisaged by sec. 74 of the Indian Contracts Act. Though there is some clerical or arithmetical error in calculating the amount because adding Rs. 18,24,428/- in Rs. 28,19,648/-, the amount comes to Rs. 46,44,070/- and after deducting the original tender amount of Rs. 32,11,015/- the amount comes to Rs. 4,33,059/- and that should be the amount of damages. Due to arithmetic error, this amount is shown to be Rs. 15,12,061/-, but calculating the amount as above, real amount comes to Rs. 14,33,059/-. It is true that though exh. 20 came to be filed by the GE Board, after the arguments were over but since the same is not referred in the award, the award would not become illegal as contended. The assessment of the damages, therefore, and assessment of the claims of both the parties by the Tribunal is just and proper and required no interference at all. The method which the Tribunal adopted to assess the damages is just and proper in this case, but if we take into consideration the Arbitration Act, the

Arbitrators are not bound by the strict rules of procedure or evidence. They may choose their own methods of proceedings.

Therefore, only interference in the impugned award is required to correct the arithmetical mistake as above said and instead of Rs. 15,12,061/-, the difference is required to be read as Rs. 14,33,059/- and no interference further is required in revisional jurisdiction in the impugned award.

In this view of the matter, both these revision applications fail and dismissed. Rule is discharged in both the revision applications.

(J.R. VORA, J.)
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